No. 17-8151

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

—v.—

ANNE PRECYTHE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MISSOURI, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of approximately 1.6 million members dedicated to the principles of liberty and equality embedded in the United States Constitution. Founded nearly a century ago, the ACLU has appeared in myriad cases before this Court, both as merits counsel and as amicus curiae, to defend the Bill of Rights. The ACLU has often appeared in this Court to address those portions of the Bill of Rights having to do with administration of the criminal justice system. The organization has a strong interest in ensuring that capital punishment protocols practiced in the United States do not violate the Eighth Amendment. And it has a particular interest in this case because it represents Petitioner Russell Bucklew before the Inter-American Commission on Human Rights, where he has argued, successfully, that proceeding with his execution under the circumstances unique to his case would violate the prohibition on cruel and inhuman punishment and could amount to torture.

The ACLU of Missouri is one of the ACLU's statewide affiliates and has more than 19,000 members. The ACLU of Missouri provided direct representation in numerous state and federal cases challenging secrecy about the administration of the death penalty.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and their indications of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

This case raises critically important questions about how the courts should adjudicate claims that a method of execution, even if generally constitutional, is unconstitutional as applied to a particular prisoner because of his idiosyncratic medical condition. Petitioner Russell Bucklew suffers from a rare medical disease, cavernous hemangioma, which poses a unique threat of excruciating pain during execution by lethal injection, the method Missouri has chosen to kill him. As a result of his medical condition, he is likely to choke on his own blood and suffocate for up to four minutes during his execution.

The court of appeals declined relief to Mr. Bucklew because it found that he was unable to identify an alternative method of execution that would cause less suffering to an individual with his medical condition. And in so concluding, it approved special procedural obstacles, applicable only to this case, which made it virtually impossible for him to meet the burden the courts imposed on him. Petitioner seeks certiorari to challenge both the requirement that a prisoner advancing an individualized as-applied challenge to a method of execution bears the burden of identifying an available alternative and the special procedural obstacles imposed on him.

This is not the first time such questions have been presented to this Court. In two prior cases, involving Alva Campbell and Doyle Hamm, respectively, this Court declined review of similar issues presented by death row inmates with idiosyncratic medical conditions. Both Mr. Campbell and Mr. Hamm maintained that their medical conditions created a substantial risk that their executions would be cruel and unusual. In both cases, this Court denied

applications for stays and petitions for certiorari. The states attempted to carry out the executions, and in both cases what the inmates feared came to pass. Both Mr. Campbell and Mr. Hamm were subjected to botched executions that had to be halted—but not before inflicting horrific and needless suffering. Neither man was ultimately executed, but both suffered unconstitutionally cruel and unusual punishment because of the complications created by their medical conditions. By granting review here and resolving confusion in the lower courts about how *Glossip v. Gross*, 135 S. Ct. 2726 (2015), governs individualized as-applied challenges, the Court has the opportunity—and responsibility—to avert another botched execution. The Court should grant certiorari to address the unfortunately recurring question of how courts should assess claims that otherwise permissible methods of execution, when applied to prisoners with particular compromised health conditions, will cause needless pain and suffering, violating the Eighth Amendment. The courts below erected insurmountable hurdles to adjudicating such claims fairly. Only this Court can ensure that Mr. Bucklew avoids the unconstitutional experience that Mr. Campbell and Mr. Hamm were made to suffer.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT PRISONERS RAISING AS-APPLIED CHALLENGES TO THE METHOD OF AN EXECUTION BASED ON THEIR UNIQUE MEDICAL CONDITIONS NEED NOT DEMONSTRATE A READILY AVAILABLE ALTERNATIVE METHOD OF EXECUTION.

In *Glossip v. Gross*, this Court held that prisoners challenging a method of execution as a violation of the Eighth Amendment on its face must demonstrate that the method poses a "risk of severe pain" that is "substantial when compared to the known and available alternatives." 135 S. Ct. at 2737. The requirement that prisoners plead and prove a known and available alternative method of execution was imposed to ensure that such a challenge not become a *sub rosa* challenge to the death penalty as such. The Court reasoned that, "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Id.* at 2732 (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)). If the only method of execution available to a State is deemed unconstitutional, the decision would have the practical effect of precluding any executions in that State. Accordingly, to avoid that outcome, the Court required a showing of an alternative method of execution.

The central questions in this case concern whether that requirement of establishing an available alternative should apply to an individual who does not challenge a method of execution in general, but only as applied to his particular circumstances, and how the courts should adjudicate and assess such

challenges as a procedural matter. Similar questions were presented to this Court before, and both times the Court denied review, with deeply unfortunate consequences. Those experiences should guide the Court in its assessment of whether to grant review this time. The Court has the opportunity to avert another terribly botched execution. As the last court that stands between Mr. Bucklew and a cruel and unusual execution, the Court should take up the questions and resolve them now.

There is good reason *not* to require individuals in Mr. Bucklew's condition to identify an alternative method of execution. A holding that lethal injection is unconstitutional as applied to Mr. Bucklew because of his rare medical condition does not risk invalidating the death penalty altogether. It affects only a single execution. Like this Court's holdings that it is unconstitutional to execute individuals with intellectual disabilities, *see, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017), a ruling sparing Mr. Bucklew from the death penalty will not render that penalty unavailable as to anyone else. Accordingly, if he shows that Missouri's lethal injection regime as applied to him will cause suffering that renders its application cruel and unusual, the Eighth Amendment should bar his execution unless prison officials identify another method that will not cause an unconstitutional degree of suffering.

In addition, where an individual has demonstrated that a method of execution, as applied to his unique medical condition, will inflict an unacceptable level of pain, the burden should shift to the State, both because it is its obligation to conduct an execution without an unconstitutionally unacceptable level of pain and suffering, and because it alone is likely to have the knowledge and experience with alternative

methods of execution to inform the question whether acceptable alternatives exist that would end the prisoner's life without inflicting unconstitutional pain and suffering. A death row prisoner is not in a position to assess how alternative methods of execution would interact with his particular medical conditions. Thus, in individualized as-applied challenges, the burden should shift to the State once a prisoner demonstrates that the proposed method of execution poses a constitutionally unacceptable risk of inflicting cruel and unusual punishment.

Alva Campbell objected to his method of execution on grounds similar to Mr. Bucklew's challenge. Petition for Writ of Certiorari, *Campbell v. Jenkins*, 138 S. Ct. 466 (2017) (mem.) (No. 17-6688). At the time of Ohio's attempt to execute him, Mr. Campbell, 69 years old, had compromised veins, and was terminally ill with cancer, severe chronic obstructive pulmonary disease, and end stage emphysema, requiring four breathing treatments every day. Motion for Stay at 17-18, *Campbell v. Ohio*, No. 17-3855 (6th Cir. Nov. 8, 2017). He maintained that his deteriorating medical condition posed a substantial likelihood that he would suffer obstructed breathing and "air hunger" during the lethal injection procedure. *Id.* He further alleged that the prison's doctors anticipated it would be perilous and difficult to insert an IV given the quality of his veins, and contemplated using a tourniquet to attempt to establish IV access. *Id.* at 1, 10. He contended that given his medical condition, lethal injection would subject him to severe, needless pain and suffering, in violation of the Eighth Amendment. *Id.* at 10.

This Court denied Mr. Campbell's request for a stay and certiorari. *Campbell*, 138 S. Ct. 466.[2] Ohio proceeded with its execution attempt on the morning of November 15, 2017. The execution team examined Mr. Campbell's arms and legs for an hour before transporting him to the execution chamber in a wheelchair. Marty Schladen, *After four unsuccessful needle pokes, Columbus killer's execution called off*, Columbus Dispatch (Nov. 15, 2017). The execution team had to help Mr. Campbell onto the gurney. *Id.* They used an ultraviolet light for the next half hour in search of a vein through which to inject the drugs that would kill him, stabbing Mr. Campbell repeatedly in his arms and leg. After they stabbed his leg, Mr. Campbell threw back his head and cried out in pain. *Id.* "The executioners tried to comfort Mr. Campbell as they searched for a way to execute him, the A.P. said, by patting him on the arm and the shoulder." Liam Stack, *Execution in Ohio is Halted After No Usable Vein Can Be Found*, N.Y. Times (Nov. 15, 2017), https://www.nytimes.com/2017/11/15/us/ohio-execution-alva-campbell.html. The prison called off the execution after concluding they could not find an injection site. Tracy Connor, *Ohio cancels execution of Alva Campbell after failing to find vein*, NBC News (Nov. 15, 2017), https://www.nbcnews.com/storyline/lethal-injection/ohio-set-execute-inmate-alva-campbell-who-needs-wedge-pillow-n820956. Mr. Campbell died of natural causes in his cell

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[2] The petition in this Court was limited to a question regarding successive petitions, but the Sixth Circuit deemed Mr. Campbell's challenge a successive petition after rejecting his contention that an as-applied challenge based on an individual's particular medical condition should be treated like a *Ford*-competency claim that is not ripe until an execution date is set. *In re Campbell*, 874 F.3d 454, 466 (6th Cir. 2017).

approximately three months later. Holly Zachariah, *Ohio Death Row Inmate Campbell Dies of Natural Causes*, Columbus Dispatch (March 3, 2018), http://www.dispatch.com/news/20180303/ohio-death-row-inmate-alva-campbell-dies-of-natural-causes.

The botched execution in Alva Campbell's case was a direct result of the Sixth Circuit's ruling that Mr. Campbell had to plead a statutorily authorized alternative method of execution in order to proceed with his as-applied challenge to the execution protocol. *In re Campbell*, 874 F.3d at 461-62.[3] The Sixth Circuit acknowledged that his alleged medical claims, "if substantiated, could raise a significant problem with administering a lethal injection," but concluded that Mr. Campbell's claims failed as a matter of law because he had not identified an alternative means of execution. *Id.* at 465. When this Court denied a stay and certiorari, the execution went forward, with disastrous consequences—largely as predicted by Mr. Campbell. The ordeal that Ohio put Mr. Campbell through was plainly cruel and unusual, regardless of whether another procedure might have avoided such suffering.

As Judge Moore, dissenting in *In re Campbell*, explained, the rationale for imposing the "alternative

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[3] Mr. Campbell had filed both a § 1983 challenge to his execution and a habeas petition alleging that he was categorically exempt from the death penalty, both predicated on his individual medical condition. In the § 1983 suit, Mr. Campbell had attempted to plead that the firing squad was a superior alternative method of execution, but the federal court rejected his amendment on the ground that the firing squad was not authorized by Ohio law. Decision and Order Denying Motion to Certify for Interlocutory Appeal at 2-3, *In re Ohio Execution Protocol Litigs.*, No. 2:11-cv-1016 (S.D. Ohio Nov. 7, 2017), ECF No. 1366.

method" requirement is inapposite where, as here, an individual does not challenge the planned method of execution as a general matter, but only because of complications arising from his unique medical condition:

> Were Campbell simply challenging Ohio's generalized use of a particular execution protocol . . . I agree with the majority that *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015), would foreclose his claim. Such a ruling would be tantamount to declaring the death penalty as a whole unconstitutional in a given state. . . . I see an important distinction between *Glossip* and Campbell's case, however, in the fact that while *Glossip* featured an across-the-board challenge to the only approved methods of execution in Oklahoma, this case concerns only whether the fact of Campbell's sentence itself is constitutional in light of Campbell's personal biological characteristics and the currently available means of execution.

In re Campbell, 874 F.3d at 468 (Moore, J., dissenting). As Judge Moore notes, this Court made clear in *Glossip* that its rule was driven by concern that a decision upholding a generalized challenge to a method of execution without an available alternative would mean the end of the death penalty in that state. *See generally*, Pet. 30-32; *Glossip*, 135 S. Ct. at 2732-33. Where that is not a concern, the alternative method requirement should not apply.

In this case, as in Mr. Campbell's, the court of appeals relied on *Glossip* to deny Mr. Bucklew relief because he had not sufficiently alleged and established an alternative method of execution that

would cause less pain. *Bucklew v. Precythe*, 883 F.3d 1087, 1091 (8th Cir. 2018). Unlike *Glossip*, however, which involved an across-the-board challenge to an execution protocol, Mr. Bucklew's as-applied challenge rests on his idiosyncratic medical vulnerability, and therefore ruling in his favor is not tantamount to invalidating the death penalty. As a result, he should not be required to demonstrate an alternative method of execution to prevail on his Eighth Amendment claim.

For more than one hundred years, this Court has recognized that the death penalty cannot be imposed in a manner that will "involve torture" or be "inhuman and barbarous—something more than the mere extinguishment of life." *In re Kemmler*, 136 U.S. 436, 447 (1890); *see also Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878); *Weems v. United States*, 217 U.S. 349, 368 (1910); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981); *see also Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring) (stating that Eighth Amendment bars "added terror, pain, or disgrace to an otherwise permissible capital sentence" (internal quotation marks and citation omitted)). An otherwise permissible execution protocol that inflicts *added* terror, pain, and torture because of the prisoner's unique medical condition violates the Eighth Amendment.

The Eighth Circuit accepted as undisputed for purposes of summary judgment that Mr. Bucklew is likely to experience extreme pain and suffocation during the lethal injection procedure. *Bucklew*, 883 F.3d at 1094. It is also conceded that execution by lethal gas is a feasible and available alternative. *Id.* The Eighth Circuit declined to issue a stay of execution, however, concluding that there was insufficient evidence that lethal gas would

substantially reduce the risk of pain and suffocation for Mr. Bucklew. *Id.* at 1096. But in an individualized as-applied challenge that does not threaten to invalidate the death penalty as such, this should not matter. If lethal injection will cause excessive pain and suffering to Mr. Bucklew because of his rare medical condition, it is unconstitutional to subject him to it regardless of how lethal gas—or any other procedure—might work. Indeed, if *both* methods available to the State would cause excessively excruciating pain and suffering, then *both* methods would be unconstitutionally cruel and unusual. A prisoner in Mr. Bucklew's shoes should not have to identify an alternative procedure; rather, that should be the State's burden if it seeks to execute him but has not yet proposed a way to do so without excruciating pain.

This conclusion is supported by international human rights standards, which inform Eighth Amendment jurisprudence. "[A]t least from the time of the Court's decision in *Trop*[*v. Dulles*, 356 U.S. 86 (1958)], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper v. Simmons*, 543 U.S. 551, 575 (2005). Mr. Bucklew has brought his case to the Inter-American Commission on Human Rights ("IACHR"), which recently ruled that executing Mr. Bucklew in light of the medical vulnerabilities he suffers would inflict cruel and inhuman punishment on him and could result in torture, both of which are prohibited by the American Declaration of the Rights and Duties of Man. App. (Inter-American Commission on Human Rights, Report No. 28/18,

Case No. 12,958, Report on Merits, Russell Bucklew (March 18, 2018)).[4] The Commission concluded:

> The Commission considers that this particular risk of choking on his own blood, being aware of it, and for a period of up to four minutes, taking in consideration the context of extreme stress and anxiety, would constitute cruel and inhuman punishment. The IACHR finds that the severity of the suffering that would be imposed under such circumstances could amount to torture.

App. 42a (IACHR Report 15 (¶ 78)). The Commission also determined that whether a proposed punishment constituted cruel and inhuman punishment or torture in this case is not dependent upon the existence of less painful alternatives. App. 43a-45a (IACHR Report 16 (¶¶ 80-82)). As the Commission ruled, proceeding with the execution of Mr. Bucklew in the face of the knowledge of the heightened pain and suffering that would be involved for him would violate the United States' international obligations to ensure it does not inflict cruel and inhuman punishment. App. 45a (IACHR Report 16 (¶ 83)).

"By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 560. In light of Mr. Bucklew's

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[4] As a Member State of the Organization of American States, the 1948 American Declaration of the Rights and Duties of Man imposes international legal obligations on the United States. App. 33a-34a (IACHR Report 12 (¶ 60)). The American Declaration guarantees the right of everyone to be free from cruel and inhuman treatment or punishment and torture. *Id.* at 41a (IACHR Report 16 (¶ 76)). And the IACHR is the entity charged with the enforcement of these rights.

uniquely compromised physical condition, the execution method proposed by prison officials violates "the basic dignity the Constitution protects." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). The Court should grant certiorari and hold that in individual as-applied challenges to methods of execution, a showing that the method will inflict excruciating pain on a prisoner above that suffered by others is sufficient to violate the Eighth Amendment, without regard to whether alternative methods of execution exist.

II. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS CONFUSION IN THE LOWER COURTS REGARDING THE PROCEDURES GOVERNING AS-APPLIED CHALLENGES TO THE METHOD OF EXECUTION.

Mr. Bucklew also seeks certiorari on two questions regarding the procedures the lower courts employed in rejecting his Eighth Amendment challenge. The court of appeals *assumed* without any evidentiary basis that the individuals responsible for carrying out Mr. Bucklew's execution were competent to do so, and barred Mr. Bucklew's requests for discovery concerning their ability to address the complications presented by his rare medical condition—a condition with which there is no reason to believe state officials have any prior experience at all. Pet. 21-25. It did so even though prison officials' own protocols do not assume that the employees are competent to access particularly challenging veins that may well be necessary in Mr. Bucklew's case. Pet. 22-23. And the court further demanded that Mr. Bucklew must prove that an available alternative would reduce the risks of needless pain *through a single witness*. Pet. 26-27. Together, these rulings made it virtually impossible for Mr. Bucklew to make the showing regarding alternative methods of execution that the Eighth

Circuit also imposed on him. These obstacles find no justification in the Federal Rules of Civil Procedure or the Federal Rules of Evidence. In the capital punishment context, the courts should be demanding full and fair adversarial testing, not constructing one-time-only obstacles that no other litigant must face. The risks of error where courts impose heightened obstacles and employ one-sided procedures in these cases are substantial, as the botched execution of Doyle Hamm graphically illustrates. Here, too, the Court's prior denial of similar claims by a particularly vulnerable death row inmate, and the horrific consequences that followed, counsel in favor of granting Mr. Bucklew's request for certiorari now, before it is too late.

On February 22, 2018, after this Court denied a stay of execution and a petition for certiorari, *Hamm v. Dunn*, 138 S. Ct. 828 (2018) (mem.), Alabama attempted to execute Doyle Hamm. The result was a torturous and bloody hours-long ordeal, in which prison officials ultimately gave up, but not before inflicting substantial needless and excruciating pain. Mr. Hamm had challenged lethal injection as applied in his case because of his compromised medical condition, including large-cell lymphoma cancer and severely deteriorated veins. *Hamm v. Dunn*, No. 2:17-cv-02083, 2018 WL 723104, at *1 (N.D. Ala. Feb. 6, 2018). The district court accepted that Mr. Hamm had proferred sufficient evidence to create material issues of fact regarding whether his peripheral veins were too compromised for injection, and whether central line placement was unduly dangerous because his enlarged lymph nodes created an increased risk of puncturing a central artery, causing severe and unnecessary pain. *Id.* at *1-*2. Rather than grant an injunction, however, the court appointed its own

independent, anonymous medical doctor to evaluate whether Mr. Hamm could sustain lethal injection. *Id.* at *2.

On February 16, 2018, days before Mr. Hamm's scheduled execution, the district court conducted a highly unusual hearing. The independent doctor communicated *in camera* and *ex parte* with the district court and later filed a written report. *Hamm v. Comm'r, Ala. Dep't of Corr.*, No. 18-10636, 2018 WL 1020051, at *1-*2 (11th Cir. Feb. 22, 2018). The doctor did not testify in court, and Mr. Hamm was not permitted to cross-examine him, or to present rebuttal evidence of any kind. The doctor found that Mr. Hamm's veins in his arm were not suitable for placement of the intravenous catheters required by Alabama's protocol. *Id.* at *2. At the district court's invitation, Alabama then agreed to alter its protocol to limit any injections to Mr. Hamm's legs or central venous access. Mr. Hamm was not permitted to respond. *Id.*; *see also*, Petition for Writ of Certiorari, *Hamm*, 138 S. Ct. 828 (No. 17-7855).

The district court also found that central line access would require the use of ultrasound and would need to be administered by an "advanced level practioner." *Hamm*, No. 18-10636, 2018 WL 1020051, at *7. It ordered the execution to proceed with the modifications it had crafted. *Id.* Mr. Hamm appealed and sought a stay from the Eleventh Circuit. The Eleventh Circuit found that the record below was inadequate to determine whether Alabama was capable of following the modifications ordered by the district court. It ordered Alabama to submit, within six hours, sworn affidavits addressing some of the unanswered questions. *Id.* Alabama filed three affidavits in the appellate court, and the Eleventh

Circuit, too, ordered that the execution could proceed. *Id.* Again, Mr. Hamm had no opportunity to respond.

Mr. Hamm filed a motion for stay and petition for certiorari with this Court, alleging that he should have been provided an opportunity to test the evidence and that the federal courts had themselves improperly devised an alternative protocol. *See* Petition for Writ of Certiorari, *Hamm*, 138 S. Ct. 828 (No. 17-7855). He argued, for example, that one of the affidavits submitted was misleading because it said, in response to whether a doctor was available to insert the IV, only that a doctor would be "present." *Id.* at 6. This response did not address whether the doctor would participate in the setting of the central line. *Id.* This Court denied relief, but two Justices would have granted Mr. Hamm's stay on the ground that he should have been afforded an opportunity to challenge through the adversarial process the last minute conclusions and evidence. *See Hamm*, 138 S. Ct. at 828 (Ginsburg, J., dissenting from the denial of the application for stay and the denial of certiorari).

When Alabama proceeded with its plan to execute Mr. Hamm, the prison staff could not find a vein for peripheral lethal injection—just as Mr. Hamm had predicted. They tried for two and a half hours to find a suitable vein, repeatedly slapping his legs and stabbing his legs and ankles. During some of these attempts, the execution team members left needles in Mr. Hamm's legs for several minutes, moving around in a painful search for a vein. Sandee LaMotte, *Death row inmate sues after 'botched' execution*, CNN (March 7, 2018), https://www.cnn.com/2018/03/07/health/alabama-execution-lawsuit/index.html. The executioners then attempted central venous access through Mr. Hamm's right groin—the area where Mr. Hamm's expert had warned that access could be

excruciating because of his cancer. The procedure was extremely painful and caused profuse bleeding, soaking the underlying pad in blood—again, as predicted. *Id.* Over the course of the more than two-hour ordeal, Mr. Hamm prayed the execution would succeed to end his pain. Tracy Connor, *Lawyer describes aborted execution attempt for Doyle Lee Hamm as 'Torture,'* NBC News (Feb. 25, 2018), https://www.nbcnews.com/storyline/lethal-injection/lawyer-calls-aborted-execution-attempt-doyle-lee-hamm-torture-n851006. "When he was finally removed from the gurney, he collapsed." Liliana Segura, *Another Failed Execution: the Torture of Doyle Lee Hamm*, Intercept (March 3, 2018), https://theintercept.com/2018/03/03/doyle-hamm-alabama-execution-lethal-injection/.

After the botched execution, Mr. Hamm and Alabama entered a private settlement agreement, dismissing all of Mr. Hamm's litigation and offering "great relief" to Mr. Hamm. *See* Columbia Law School Media Advisory, *Bernard Harcourt and the State of Alabama Settle Civil Rights and Habeas Corpus Lawsuits* (March 27, 2018), http://www.law.columbia.edu/news/2018/03/bernard-harcourt-and-state-alabama-settle-civil-rights-and-habeas-corpus-lawsuits. While the terms are confidential, it is a reasonable inference that Alabama will not again attempt to execute Mr. Hamm.

As in Mr. Hamm's case, the courts in Mr. Bucklew's case also crafted unique procedural rules for evaluating his as-applied challenge to lethal injection. As noted above, the Eighth Circuit simply *assumed* the competence of key players in the execution process, even though prison official's own protocols do not assume such competence. The court barred any discovery into the question. And it applied

a new rule, with no foundation in the rules governing civil litigation, that Mr. Bucklew must make a comparative showing about alternative methods of execution through a single witness.

Serious challenges to execution protocols based on an individual's specific medical condition warrant the full benefit of the adversarial process. Such claims ask the courts to avoid a torturous execution. There is no basis to subject the Eighth Amendment's guarantee against cruel and unusual punishment to special procedural obstacles applicable only to challenges to the method of execution. The IACHR in Mr. Bucklew's case also found that the extraordinary obstacles imposed on Mr. Bucklew violated international human rights obligations. As the IACHR concluded:

> In capital cases, the State has an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die. In particular, the convicted person must have access to information related to the precise procedures to be followed, the drugs and doses to be used in the case of execution by lethal injection, and the composition of the execution team as well as the training of its members. . . . Any person subjected to the death penalty must have the opportunity to challenge every aspect of the execution procedure and such information is necessary to file a challenge.

App. 39a (IACHR Report 14 (¶¶ 71-72)).

Mr. Bucklew should be permitted to challenge the training and qualifications of the prison staff to carry

out his execution in light of his rare medical condition. The Eighth Circuit erred in denying him any discovery on that issue, and indeed pretermitted the issue by adopting an unfounded assumption of competence that the State itself does not adopt. In Mr. Hamm's case, the absence of full and fair adversarial testing led the federal courts to rely on demonstrably erroneous factual conclusions, and allowed Alabama to proceed with a horribly botched execution. This history is in danger of repeating itself. The Court has an opportunity to avert such a repetition, by granting review and holding that medically compromised prisoners should be granted access to information about the training and qualifications of the execution team if it is relevant to their sufficiently pleaded claims, and should not be subject to unique procedural obstacles to full and fair adversarial adjudication.

CONCLUSION

For all the above reasons, the Court should grant the petition for a writ of certiorari.

April 6, 2018

Respectfully submitted,

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APPENDIX

[LOGO]
INTER-AMERICAN COMMISSION
ON HUMAN RIGHTS

REPORT No. 28/18

CASE 12,958

REPORT ON MERITS

RUSSELL BUCKLEW

UNITED STATES

OEA/Ser.L/V/II.
Doc. 33
www.cidh.org

Approved by the Commission on March 18, 2018.

Cite as: IACHR, Report No. 28/18, Case 12.958. Merits. Russell Bucklew. United States, March 18, 2018.

[LOGO] Organization of American States

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I. SUMMARY

1. On May 19, 2014, the Inter-American Commission on Human Rights (hereinafter, "the Inter-American Commission" or "the IACHR") received a petition filed by the American Civil Liberties Union (ACLU) (hereinafter, "the petitioners") against the United States of America (hereinafter, "the United States" or "the State"). The petition was submitted on behalf of Russell Bucklew (hereinafter, "the alleged victim" or "Mr. Bucklew") deprived of his liberty on death row in the state of Missouri.[1]

2. The Commission adopted its Admissibility Report No. 54/14 on July 21, 2014.[2] On July 28, 2014 the Commission notified that report to the parties and offered to facilitate a friendly settlement process if the parties wished to pursue that. Both parties were granted the deadlines established by the Commission's Rules of Procedure to submit their additional observations on the merits.[3]

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[1] The petition was initially lodged on behalf of Mr. Bucklew and Charles Warner. This report concerns the situation of Mr. Bucklew. The case of Mr. Warner is still under consideration by the IACHR.

[2] IACHR. Report No. 54/14. Petition 684-14. Admissibility. Russell Bucklew and Charles Warner. United States. July 21, 2014.

[3] On May 20, 2014, the Commission adopted Resolution 14/14 requesting the Government of the United States to take precautionary measures regarding this matter. Pursuant to Article 25 of its Rules of Procedure, the Commission requested the government of the United States to refrain from executing Russell Bucklew until the IACHR ruled on the merits of the individual petition filed on his behalf. Available at: http://www.oas.org/en/iachr/decisions/pdf/2014/MC177-14-EN.pdf.

3. The petitioners alleged that the lethal injection protocol in Missouri creates an intolerable risk of excruciating pain. They claimed that, given a serious congenital medical condition that Mr. Bucklew suffers, the current protocol creates a substantial risk that the drug will not circulate properly, leading the alleged victim to hemorrhage, choke and suffocate. Petitioners further argued that the secrecy surrounding the development and implementation of lethal injection protocols in Missouri has effectively prevented death row prisoners from arguing that a given method of execution violates the prohibition of cruel and unusual punishment. On March 14, 2018 the petitioners informed the Commission that the execution of the alleged victim was scheduled by the state of Missouri for March 20, 2018.[4]

4. The State argued that the alleged victim has been provided his due process rights and judicial guarantees, and that the domestic courts have considered his allegations concerning the method of execution and Missouri's protocol. The State maintained that the death penalty is not incompatible with international law and that lethal injection has been considered to be a more humane method.

5. Having examined the positions of the parties and the established facts, the Inter-American Commission concluded that the United States is responsible for violating Articles I (right to life, liberty and personal security), XVIII (right to a fair trial), XXV (right of protection from arbitrary arrest)

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[4] On the same date, the IACHR sent this information to the State and, given the urgency, requested its observations within a period of two days. The IACHR did not receive the observations of the United States.

and XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration") in the case of Russell Bucklew. In the event the execution of Mr. Russell Bucklew is carried out, the State would be responsible for a serious and irreparable violation of the fundamental right to life protected in Article I of the American Declaration.

II. POSITIONS OF THE PARTIES

A. Position of the Petitioners

6. The petitioners stated that Russell Bucklew was sentenced to death on May 15, 1997, in the state of Missouri in the United States. They indicated that the Missouri Supreme Court first set his execution date for May 21, 2014, but on May 9, 2014, Mr. Bucklew filed suit in the United States District Court-Western District of Missouri challenging Missouri's execution protocol as it would apply to him specifically. On May 20, 2014, the United States Supreme Court granted Mr. Bucklew a stay and ordered the United States Court of Appeals for the Eighth Circuit to hear his case. Petitioners affirmed that the Eighth Circuit subsequently ruled that the federal district court erred in dismissing Mr. Bucklew's complaint because it was not patently obvious that he could not prevail or that an amendment to the complaint would be futile. Petitioners informed that, on June 15, 2017, the district court granted summary judgment in favor of the State. This decision was later affirmed by the Eighth Circuit Court of Appeals on March 6, 2018. According to the most recent information provided, Mr. Bucklew's execution has been scheduled for March 20, 2018.

7. With regard to the suit filed by Mr. Bucklew challenging Missouri's execution protocol before the

United States District Court, petitioners reported that the Eighth Circuit concluded Mr. Bucklew failed to establish that the lethal injection, as applied to him, constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. According to the information petitioners provided, the court did not challenge Mr. Bucklew's contention that lethal injection posed "a substantial risk of serious and imminent harm" to him but considered, under the Supreme Court's decision in Glossip v. Gross, that he had failed to show that his proposed alternative method of execution-induced hypoxia (lethal gas)—was a "feasible, readily implemented" method that would substantially reduce his suffering.

8. The petitioners affirmed that the lethal injection protocol that the state of Missouri plans to use for the execution of Mr. Bucklew calls for the administration of five grams of pentobarbital, administered through an IV line into the execution chamber, where the prisoner is alone and strapped to a gurney. The petitioners opposed the protocol because it calls for proceeding with executions using compounded pentobarbital; for removing methylene blue from the saline fluids used to start and flush the IV line; and it provides the option to use a central venous line (femoral, jugular, or subclavian) for the placement of the intravenous line, over the peripheral line access, commonly used in other states' protocols. They stated that during the execution no medical personnel would be close at hand; but would monitor the prisoner remotely from the "execution support room" while non-medical personnel administer the lethal drug by injecting it into a syringe.

9. The petitioners indicated that Mr. Bucklew's execution with this protocol presents a unique threat of cruel, inhuman, or degrading treatment and even

torture. They explained that Mr. Bucklew suffers since infancy from cavernous hemangioma in his neck and head, a blood vessel condition that causes clumps of weakened, malformed vessels to grow in his head, face, and throat, displacing healthy tissue and rupturing under stress. They further explained that Mr. Bucklew also has a massive vascular tumor occupying his nose, throat and airway passages. As a result, petitioners affirmed that his conditions create a very substantial risk that he will suffer excruciating, even torturous, pain during an execution. Petitioners added that, in light of the medications that Mr. Bucklew takes to manage his medical condition, there is a risk of adverse events resulting from drug interactions. In this respect, they determined that the risks arising from drug interactions and the anesthetic effects of pentobarbital are further exacerbated by the use of compounded pentobarbital, which, unlike a manufactured drug, carries no guarantees of its safety, potency, or purity.

10. The petitioners argued that the state of Missouri has acquired its pentobarbital in a suspect manner, in the absence of any regulation or accountability. They sustained that the Missouri Department of Corrections refuses to disclose any information about the drug's safety, purity, and potency, and will not even confirm whether the drug is subject to any laboratory testing at all.

11. The petitioners argued that the secrecy surrounding the use of untested drugs for execution is incompatible with human rights standards because the realization of specific rights imposes a duty of transparency on states, and that it undermines the public's right to information needed to establish whether deprivation of life is arbitrary or lawful. The petitioners affirmed that while international law does not per se prohibit the death penalty, it does limit the

methods that may be used to carry it out. In their view, countries that choose to retain the death penalty have a clear obligation to disclose the details of their application of the penalty, including the methods and protocols of execution, and must carry out the execution in a manner that "causes the least possible physical and mental suffering."

12. Petitioners indicated that the object of the petition is to challenge the following defects in the lethal injection protocol that will be applied in this case: (a) the protocol poses the risk of excruciating pain; (b) it is experimental, shrouded in secrecy and involves drug combinations that have not been approved by the Food and Drug Administration; and (c) it is administered by individuals who lack the necessary training. In light of the foregoing, the petitioners asked the Commission to determine that Mr. Bucklew's case presents violations of rights protected under the American Declaration, including the right to life (Article I), security of the person and freedom from cruel, infamous or unusual punishment (Article XXVI), and the rights to a fair trial and due process (Articles XVIII, XXVI).

B. Position of the State

13. The State asked the Commission to reconsider its decision on the admissibility of the instant case arguing that it "never received a petition under Article 23 of the Commission's Rules, nor a notice of consideration *motu propio* under Article 24 (...) rather the US received a request for precautionary measures." On this point the Commission notes that in its communication of May 20, 2014, it informed the United States about the processing of the petition and granted the timeframe provided in its Rules of Procedure to present allegations on its admissibility.

14. The State maintained that the American Declaration "is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States." The State also informed that, although it considers precautionary measures to be a "nonbinding recommendation," it transmitted the request to the Governor and Attorney General of Missouri on May 20, 2014.

15. The State argued that the alleged victim has had access to an extensive domestic judicial review process in which his claims were reviewed. It indicated that the Missouri Supreme Court, after considering his claims raised at that point and weighing whether capital punishment was disproportionate, affirmed Mr. Bucklew's convictions on August 25, 1998. The State also made reference to the applications filed by the alleged victim, including requests for *certiorari* and habeas corpus, as well as the claims pursued by Mr. Bucklew and other death row inmates to challenge the lethal injection protocol in the state of Missouri. It further referred to the proceedings that took place in 2014 after an execution date was scheduled by the Missouri Supreme Court for May 21, 2014, and the stay of execution that was later granted.

16. The State alleged that any decision on the merits in this case would entail the fourth instance formula, which prevents the Commission from "freely second-guessing domestic courts' legal and evidentiary judgments calls." In this sense, the State reiterated that the alleged victim has had due process through many opportunities to challenge both his conviction for capital murder and the proposed method of execution.

17. In addition, the State argued that the claims concerning Missouri's current protocol and the

allegations on the secrecy surrounding such documents, should not be considered either, given the fourth instance standard as it concerns matters of domestic law. Nonetheless, the State maintained that there is sufficient public information regarding the details of Missouri's injection protocol, which in fact was taken into account to successfully secure a stay of execution from the U.S. Supreme Court in favor of the alleged victim. Therefore, the State considered that the right to due process has not been violated with respected to the alleged secrecy surrounding Missouri's protocol.

18. The State indicated that international law permits capital punishment when it is duly prescribed for the commission of the most serious crimes and carried out by a State in accordance with due process of law and stringent procedural safeguards, as it considers is the situation in the United States. Thus, the State affirmed that capital punishment is compatible with the right to life under international law and highlighted that the United States has not signed or ratified any international convention obligating it to abolish capital punishment.

19. As for lethal injection as a method of execution, the State alleged that this method has often been adopted as more humane than other methods that have been tried, and that the United Nations Human Rights Committee has found that lethal injection does not violate the International Covenant on Civil and Political Rights. The State contended that it should be given a "wide margin of appreciation," deferring to the discretion of local actors who have to deal with complicated medical and scientific circumstances and are in the best position to assess such matters. In this sense, the State referred to domestic decisions in other death penalty cases which found that lethal injection did not

constitute cruel and unusual punishment and was in fact deemed to be more humane than other methods.

III. PROVEN FACTS

A. The application of lethal injection in the State of Missouri

20. The Commission takes note of the Protocol for Preparation and Administration of Chemicals for Lethal Injection of the Missouri Department of Corrections. Under this protocol, the state of Missouri regulates different elements of the preparation and application of the lethal injection, such as: the execution team members, the preparation of chemicals, the intravenous lines, the monitoring of prisoners, the administration of chemicals and the documentation of chemicals.[5]

21. According to the text of the abovementioned protocol, medical personnel are responsible for the preparation of the lethal chemicals before the execution; for the determination of the most appropriate locations for intravenous (IV) lines and insertion; and for monitoring of the prisoner during the execution.[6] With regard to the insertion of the IV lines, the protocol calls for two, the primary IV line that may be inserted as a peripheral line or as a central venous line (e.g., femoral, jugular, or subclavian) provided they have appropriate training,

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[5] Missouri Department of Corrections. Preparation and Administration of Chemicals for Lethal Injection. Available at: https://deathpenaltyinfo.org/files/pdf/ExecutionProtocols/MissouriProtocol10.18.2013.pdf.

[6] Missouri Department of Corrections. Preparation and Administration of Chemicals for Lethal Injection. Available at: https://deathpenaltyinfo.org/files/pdf/ExecutionProtocols/MissouriProtocol10.18.2013.pdf.

education, and experience for that procedure; and the secondary IV line as a peripheral line. The second IV should not be used if the prisoner's physical condition makes it unduly difficult to insert more than one.

22. Additionally, the protocol calls for the execution team to be comprised of department employees and contracted medical personnel including a physician, nurse, and pharmacist. In general terms, it proscribes that the team will also include anyone selected by the department director "who provides direct support for the administration of lethal chemicals, including individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure."[7] The members of the execution team under the observation of medical personnel are to be responsible for the injection of the chemicals into the prisoner.[8]

B. Russell Bucklew's criminal conviction and his medical condition

23. On May 1997, Mr. Bucklew was sentenced to death for first degree murder, after a jury trial. He also received prison sentences of 30 years for kidnapping, 30 years for burglary, 30 years for rape, and five years for armed criminal action.[9] Since then,

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[7] Missouri Department of Corrections. Preparation and Administration of Chemicals for Lethal Injection. Available at: https://deathpenaltyinfo.org/files/pdf/ExecutionProtocols/MissouriProtocol10.18.2013.pdf.

[8] Missouri Department of Corrections. Preparation and Administration of Chemicals for Lethal Injection. Available at: https://deathpenaltyinfo.org/files/pdf/ExecutionProtocols/MissouriProtocol10.18.2013.pdf.

[9] State's submission dated March 28, 2016, p.2. See also: Bucklew v. Lombardi, No. 14-8000-CV-W-BP.

Mr. Bucklew has been detained at the Potosi Correctional Center in Mineral Point, Missouri.[10]

24. The available information indicates that Mr. Bucklew's conviction and sentence were affirmed on direct appeal. Likewise, his petition for post-conviction relief was denied and this was affirmed by the Supreme Court of Missouri. Mr. Bucklew also filed a petition for a federal writ of *habeas corpus* which was denied and this was affirmed by the United States Eighth Circuit Court of Appeals. An application for *certiorari* to the U.S. Supreme Court was denied as well.[11]

25. It is not disputed that Mr. Bucklew suffers from a rare and congenital medical condition, known as "cavernous hemangioma."[12]

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[10] Initial petition before the IACHR, p. 6.

[11] See: Initial petition before the IACHR; State's submission dated March 28, 2016; and Bucklew v. Precythe, No. 17-3052, 2018 WL 1163360.

[12] Initial petition before the IACHR, p. 2. The petitioner explained that "carvernous hemangioma is a blood vessel condition that causes large tumors of malformed blood vessels to grow on Mr. Bucklew's head, face, and neck. Stricken with this condition since childhood, Mr. Bucklew frequently endures severe pain, nausea, dizziness and difficulty breathing. The tumors are so large that the blood vessels within them are distended and weak. Under stress, they rupture. His airway is compromised by a vascular tumor." Petitioner's submission dated March 14, 2018, p. 2. See also: Bucklew v. Lombardi, No. 14-8000-CV-W-BP.

C. Judicial actions challenging Missouri's lethal injection protocol

1. Judicial proceedings before 2014

26. According to the available information, Mr. Bucklew has filed three different judicial actions raising allegations regarding the lethal injection protocol in the State of Missouri, as well as specific considerations as to his medical condition and the use of certain drugs for the execution. The Commission does not have detailed information about the course of these proceedings, as the petitioners and the State only made brief references to them. In the State's submission dated March 28, 2016 it presented a brief timeline of these actions.

27. Specifically the State referred to the first suit filed in 2009 before the Missouri District Court by Mr. Bucklew and other death row inmates. According to the State, this suit challenged the lethal injection protocol in the state of Missouri and claimed that Missouri authorities did not obtain the drugs used in this method lawfully, that they were not prescribed by a licensed practitioner, and that these were not approved by the Federal Food and Drug Administration for use in lethal injections. Specifically this action sought a declaratory judgment that Missouri's lethal injection violates the Food, Drug and Cosmetic Act ("FDCA") as well as the Controlled Substances Act ("CSA").[13] The State indicated that, on May 19, 2009, the district court decided in favor of the Missouri

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[13] The State cited: Ringo v. Lombardi, No. 09-4095-CV-C-NKL, 2009 WL 1406980, at *1(W.D. Mo. May 19, 2009). State's submission dated March 28, 2016.

Department of Corrections.[14] This decision was then appealed to the Eighth Circuit Court of Appeals which dismissed the complaint considering that the protocol being challenged had changed due to supply issues. [15] In addition, the State mentioned that litigation was brought to unseal documents in the court's docket, including the deposition of an anesthesiologist, which the litigants considered could reveal key information about Missouri's execution procedures.[16] Lastly, the State said that, on January 6, 2016, the district court denied the request to unseal.

28. According to the State, the second suit was filed by Mr. Bucklew and a group of death row inmates in 2012 against various officials of the Missouri Department of Corrections. It claimed that Missouri's execution protocol creates a substantial risk of severe pain constituting cruel and unusual punishment; that the protocol constitutes deliberate indifference to serious medical needs in violation of due process; that the process for setting execution dates denies the inmates access to the courts in violation of due process; that the failure to comply with the injection protocol violates due process and equal protection rights; and that Missouri has concealed information from the public.[17] On May 2, 2014 the district court dismissed the case. The State affirmed at that time that litigation was still ongoing

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14 The State cited: Ringo v. Lombardi, No. 09-4095-CV-C-NKL, 2009 WL 1406980, at *1(W.D. Mo. May 19, 2009). State's submission dated March 28, 2016.

15 The State cited: Ringo v. Lombardi, 677 F.3d 793 (8th Cir. 2012). State's submission dated March 28, 2016.

16 State's submission dated March 28, 2016.

17 State's submission dated March 28, 2016, p.4.

on plaintiffs' motion to unseal documents from the docket for the public. The Commission does not have further information regarding this proceeding.

2. Judicial proceedings since 2014

29. Both parties referred in detail to the judicial proceedings initiated from 2014 to the present and which are summarized as follows.

30. On April 9, 2014 the Missouri Supreme Court set Mr. Bucklew's execution for May 21, 2014.[18]

31. On May 9, 2014 Mr. Bucklew filed a new lawsuit in the United States District Court for the Western District of Missouri, alleging that Missouri's lethal injection method posed a unique risk to him because of his medical condition. He also sought a preliminary injunction and a stay of execution. Among his allegations, Mr. Bucklew claimed that failing to take reasonable and necessary steps to assess the risk he would face during his execution "constitutes deliberate indifference to his serious medical needs and violates his rights under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment."[19]

32. On May 19, 2014 the district court denied both motions.[20] In its decision, the court reviewed affidavits from three experts submitted by Mr. Bucklew, and found that these were "insufficient to

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18 Initial petition before the IACHR, p. 6.

19 State's submission dated March 28, 2016, p.4 and petitioners' submission dated February 4, 2015, p. 8. They cited: Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014.

20 State's submission dated March 28, 2016, p.4 and petitioners' submission dated February 4, 2015, p. 8. They cited: Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014.

conclude that any adverse consequences [Mr. Bucklew] may suffer rise to the level of unconstitutional pain." Moreover the court considered that:

> Although the affidavits contain words such as "significant" and "substantial risk," a closer look reveals that the affidavits do not contain the specificity necessary to prevail on an Eighth Amendment claim. For example, when discussing the possibility of adverse drug interactions, [Expert Z.] fails to explain how the medications could interact to increase Bucklew's pain. Although he concludes there is a substantial risk that drug interactions could cause pain, he bases this conclusion on the fact that medications "may" interact with pentobarbital. When discussing the possibility that the lethal drug will not circulate as intended, there is no explanation as to how the drug should circulate or will circulate. Similarly there is no explanation as to how he defines "prolonged" or "extremely painful." Lastly, the affidavits are void of discussion regarding the length of time Bucklew may suffer pain. [...] *See Fierro v. Gomez* [...] (determining that execution by lethal gas is cruel and unusual punishment by considering: (1) the extreme pain an inmate would suffer; (2) the specific length of time this extreme pain lasts; and (3) the substantial risk that an inmate will suffer this extreme pain for several minutes); *see also Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (holding that "speculation cannot substitute for evidence that the use of the drug is sure or very likely to cause serious illness and needless suffering") [...] *Whitaker v.*

> *Livingston*, 732 F.3d 465, 468-69 (5th Cir. 2013)("It is indeed not unreasonable to assume that if a prisoner has the right to be free from a demonstrated risk of severe pain when compared to a known and available alternative, he ought to have the opportunity to prove the risk of pain and the availability of alternatives. Even so, plaintiffs must point to *some* likelihood that such pain will be severe and that some alternative may exist. It is unacceptable to claim that some unspecified amount of time is required, just in case they might be able to show that there might be some risk of potentially excessive pain ...." "[U]nknown unknowns [about the dangerous propensity of a drug used for lethal injection] are insufficient to demonstrate a risk of harm; something more is needed to meet the difficult preliminary-injunction standard.")[21]

33. Mr. Bucklew appealed this decision to the United States Court of Appeals for the Eighth Circuit. On May 20, 2014 the Eighth Circuit initially reversed this decision and granted the stay of execution, the motion having been heard by a three-judge panel and granted by a vote of 2-1. Immediately on the same date, the Eighth Circuit later sitting *en banc* reversed the ruling of the panel, and decided the execution would proceed.[22]

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[21] Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014.

[22] State's submission dated March 28, 2016, p.4 and petitioner's submission dated February 4, 2015, p. 8. They cited: Bucklew v. Lombardi, 565 F. App'x 562, 564 (8th Cir.), opinion vacated on rehearing en banc (May 20, 2014); and Bucklew v. Lombardi, 565 F. App'x 562 (8thCir. 2014), rev'd en banc (mem.).

34. Mr. Bucklew then applied to the U.S. Supreme Court for a stay of execution. On May 21, 2014, the U.S. Supreme Court ordered that the execution be stayed, pending disposition of the appeal by the Eighth Circuit.[23]

35. On March 6, 2015 the Eighth Circuit Court ruled that in dismissing Mr. Bucklew's complaint the federal district court erred "because it was not patently obvious that he could not prevail or that an amendment to the complaint would be futile."[24] The Eighth Circuit Court remanded the case to the district court to further examine petitioner's proposed alternatives to the current protocol and Missouri's willingness to alter its procedure to accommodate those alternatives. At the time, the State indicated that "this ruling technically ended the Supreme Court's stay of execution, but the Missouri Supreme Court has not set a new date of execution, so the effect has been that of an indefinite stay."[25]

36. After the mandate issued by the Eighth Circuit Court, Mr. Bucklew filed several amended complaints, three of which were dismissed. The fourth amended complaint asserted an Eighth Amendment challenge, alleging that Missouri's method of execution is unconstitutional if applied to Mr. Bucklew due to his medical condition. Further

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23 State's submission dated March 28, 2016, p.4 and petitioner's submission dated February 4, 2015, p. 4. They cited: Bucklew v. Lombardi, 134 S. Ct. 2333 (2014). 572 U.S. Order 13A1153 (May 21, 2014) (staying the case and denying certiorari); Order, Bucklew v. Missouri, Case No. 13-10165 (U.S. May 20, 2014); and Bucklew v. Lombardi, Case No. 14-2163 (8th Cir. May 20, 2014).

24 Petitioners' submission dated March 14, 2018, p. 1.

25 State's submission dated March 28, 2016, p.5.

specific allegations in this last amended complaint indicated that using any lethal drug and carrying out the execution by lethal injection will pose "an enormous risk that Mr. Bucklew will suffer extreme, excruciating and prolonged pain- all accompanied by choking and struggling for air." It was also alleged that allowing Mr. Bucklew the possibility to adjust in the gurney would not be sufficient, as "the stress of the execution may unavoidably cause Mr. Bucklew's hemangiomas to rupture, leading to hemorrhaging, bleeding in his throat and through his facial orifices, and coughing and choking on his own blood." In addition, it was requested that a complete set of imaging studies be conducted to fully evaluate and establish the risks involved in the execution by lethal injection considering his medical condition.[26]

37. On June 15, 2017, the district court granted summary judgment at the Missouri Department of Corrections' request, after finding that Mr. Bucklew's complaint failed to show that execution by nitrogen hypoxia would substantially reduce the risk of pain or suffering.[27]

38. A copy of this decision is included in the Commission's case file. The pertinent parts of the ruling are summarized as follows.[28]

39. The decision took into consideration the available information on Missouri's death penalty protocol, stating that while such information "has not been succinctly described" the parties "implicitly agree" that it involves the intravenous administration

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[26] See: Bucklew v. Precythe, No. 17-3052, 2018 WL 1163360.

[27] Petitioner's submission dated March 14, 2018, p. 2.

[28] Bucklew v. Lombardi, No. 14-8000-CV-W-BP.

of pentobarbital. The court also referred to Mr. Bucklew's medical condition, but stated that from the pertinent parts of the protocol it is confirmed that "a central line in the femoral vein may be used instead of inserting an IV in the peripheral veins."[29] It also considered the information on the risk of Mr. Bucklew's femoral vein rupturing, based on the expert opinion proposed by Mr. Bucklew's defense, who "testified that the femoral vein is large and capable of 'taking a fair amount of fluid' when the central line is properly placed, and the risk of that vein rupturing is 'unlikely.'" Based on this expertise, the court asserted that "the risk of [Mr. Bucklew's] veins rupturing was limited to his peripheral veins. According to the expert, there was no reason to believe that Mr. Bucklew's medical condition "made his femoral vein more susceptible to rupture than might otherwise be expected."

40. In addition and based on the file record, the court established that Mr. Bucklew's medical condition "will not affect the flow of chemicals in his bloodstream once they are introduced through the femoral vein, or otherwise affect his expected response to the pentobarbital."

41. As for the factual disputes, the court also noted that these involved (i) Mr. Bucklew's ability to adjust his breathing once the pentobarbital begins to take effect, since it was claimed that due to his medical condition he has difficulty breathing while in

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[29] The Court noted that this scenario was "assuming that an IV could be placed [in the peripheral veins] in the first place" considering the agreement from the parties that because of the "cavernous hemangioma" Mr. Bucklew's peripheral veins cannot be used for the execution because "of the risk that they will rupture."

the "supine position," which is the position required for inserting a central line:[30] and (ii) how quickly the pentobarbital will deprive Mr. Bucklew "of the ability to sense that he is choking or unable to breathe." While the court referred to expert opinions from both Mr. Bucklew's defense and the Missouri Department of Corrections on this latter point, which were contradictory, the decision stated that the issue could not be resolved on summary judgment.[31]

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[30] On this point, the decision recalled that "when required to be on his back [Mr. Bucklew] can adjust his breathing so that he can remain in that position" for instance as it was possible for him "to lie on his back approximately an hour while undergoing an MRI." Bucklew v. Lombardi, No. 14-8000-CV-W-BP.

[31] The pertinent parts of these expert opinions are referred to in the decision of the Eighth Circuit Court of Appeals dated March 6, 2018:

> Bucklew's expert opined that his condition will cause him to experience severe choking and suffocation during execution by lethal injection. When Bucklew is supine, gravity pulls the hemangioma tumor into his throat which causes his breathing to be labored and the tumor to rupture and bleed. When conscious, Bucklew can "adjust" his breathing with repeated swallowing that prevents the tumor from blocking his airway. But during the "twilight stage" of a lethal injection execution, [expert] Dr. Zivot opined that Bucklew will be aware he is choking on his own blood and in pain before the pentobarbital renders him unconscious and unaware of pain. Based on a study of lethal injections in horses, Dr. Zivot estimated there could be a period as short as 52 seconds and as long as 240 seconds when Bucklew is conscious but immobile and unable to adjust his breathing; his attempts to breath will create friction, causing the tumor to bleed and possibly hemorrhage. In Dr. Zivot's opinion, there is a "very, very high likelihood" that Bucklew will suffer "choking complications, including visible hemorrhaging," if he is

42. In sum, the court established that "construing the record in [Mr. Bucklew's] favor reveals that it could be fifty-two to 240 seconds before the pentobarbital induces a state in which [Mr. Bucklew] could no longer sense that he is choking or unable to breathe."

43. As for the legal analysis, the court considered the ruling of the Supreme Court in *Glossip v. Gross* on "what a prisoner must establish to succeed on an Eighth Amendment method-of-execution claim," which requires him or her: (i) to establish that the method to be utilized "presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent

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executed by *any* means of lethal injection, including using the drug pentobarbital.

According to [Missouri Department of Corrections, expert] Dr. Antognini, pentobarbital causes death by "producing rapid, deep unconscious[ness], respiratory depression, followed by... complete absence of respiration, decreased oxygen levels, slowing of the heart, and then the heart stopping." In contrast to Dr. Zivot, Dr. Antognini opined that pentobarbital would cause "rapid and deep unconsciousness" within 20-30 seconds of entering Bucklew's blood stream, rendering him insensate to bleeding and choking sensations. Dr. Antognini also challenged Dr. Zivot's opinion that a supine Bucklew, unable to adjust his breathing, will be aware he is choking on his own blood and in pain from the tumor blocking his airway before the pentobarbital renders him unconscious. Dr. Antognini noted that, between 2000 and 2003, Bucklew underwent general anesthesia eight times, at least once in a supine position. In December 2016, Bucklew lay supine for over an hour undergoing an MRI, with no more than discomfort. The MRI revealed that his tumor had slightly shrunk since 2010.

See: Bucklew v. Precythe, No. 17-3052, 2018 WL 1163360.

dangers;" (ii) to "identify a known and available alternative method of execution that entails a lesser risk of pain," this alternative must be "feasible, readily implemented, and in fact significantly reduce [the] substantial risk of severe pain."

44. On the risk of serious illness or suffering, the court concluded that inserting the line in Mr. Bucklew's femoral vein "does not present any risk of serious illness or needless suffering;" and that from the file record it was not possible to establish a "conclusive determination regarding the risk that [Mr. Bucklew] will choke and be unable to breathe for a period of time that would violate the Eighth Amendment."

45. Among other considerations, the court noted that Mr. Bucklew was not able to establish a legal argument to discuss the evidence presented by the Missouri Department of Corrections indicating that the line could be inserted in his femoral vein to administer the execution drugs. In this regard, the decision acknowledged that the factual issues raised by Mr. Bucklew's allegations addressed the "potential difficulty in locating the femoral vein and the fact that medical personnel might require multiple attempts to locate it... [which as alleged by Mr. Bucklew] will increase his stress, thereby increasing his breathing rate and making it more likely that he will choke." The court concluded that Mr. Bucklew did not quantify such risks nor did he explain how these facts independently establish that Missouri's current protocol presented a risk of serious illness or needless suffering for him. The court also dismissed this allegation based on its speculative nature and that an Eighth Amendment claim cannot be grounded on the likelihood that the medical procedure would be performed incorrectly.

46. In addition, considering the factual dispute as to how long Mr. Bucklew will be aware that he is choking or unable to breathe but unable to adjust his breathing to remedy this situation after the drugs are administered, the court reiterated that these issues could not be resolved on summary judgment but at trial. The court stated that "solely for purposes of further discussion, ...[it] presume[d] that there is a substantial risk that [Mr. Bucklew] will experience choking and an inability to breathe for up to four minutes."

47. On the alternative measures standard, the court considered Mr. Bucklew's request that the execution be performed with nitrogen gas-induced hypoxia as he contended that it will "significantly reduce the risks of severe pain and suffering." Regarding this allegation, Mr. Bucklew also raised opposition to the application of the *Glossip* standard to his case contending that this judgment involved "*facial challenge*" while his case presented an "*as-applied challenge.*" The court dismissed this argument deeming there was no distinction set by the *Glossip* standard between these two possible challenges.

48. The decision then analyzed two main questions: (i) whether the use of nitrogen gas will cause Mr. Bucklew "to become unaware of his choking and breathing difficulties sooner than he would under the current protocol," which is expected to cover four minutes if the pentobarbital is used; and (ii) whether "that difference in time [was] sufficient to permit the court to find that nitrogen gas will make a 'significant' difference in [Mr. Bucklew] suffering." Mainly the court considered one of the expert opinions based on which it established that there was no significant difference between these two methods,

nor in the "speed" of their lethal effect. In general, the court considered that Mr. Bucklew did not provide sufficient and competent evidence to support that the effects of nitrogen gas will act faster than pentobarbital.

49. On March 6, 2018, the Eighth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the Missouri Department of Corrections, and dismissed Mr. Bucklew's challenge to lethal injection in his case. Circuit Judge Colloton dissented. The pertinent parts of the ruling and the dissent are summarized as follows.[32]

50. The decision centered the debate on whether the Eighth and Fourteenth Amendments would bar Missouri authorities from employing a procedure that is authorized by Missouri statute to execute Mr. Bucklew. The court analyzed the information from the two expert opinions presented by the parties as well as the application of the *Glossip* standard. The ruling also noted that, while the challenged decision declined to rely on the likelihood of needless suffering, it established that Mr. Bucklew failed to provide "adequate evidence" that the alternative method of execution he proposed would "significantly reduce a substantial risk of severe pain."

51. Considering the issue as to whether a method of execution would constitute cruel and unusual punishment, the court deemed it appropriate to rule on this specific "issue of law" by summary judgment. The court then considered that:

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[32] Bucklew v. Precythe, No. 17-3052, 2018 WL 1163360.

- Nitrogen hypoxia is an authorized method of execution under Missouri Law, but it has not been used since 1965 and does not have a protocol in force for execution by lethal gas;
- Even though Mr. Bucklew was allowed to submit "extensive discovery" regarding his proposed method of execution, given "Missouri's lack of recent experience such discovery produced little relevant evidence and no evidence that the risk posed by lethal injection is substantial when compared to the risk by lethal gas;"
- Neither the assessment provided by Mr. Bucklew's appointed expert nor the State's expert were conclusive or sufficient to support the use of lethal gas as opposed to lethal injection;
- Comparing both expert opinions at the request of Mr. Bucklew regarding the time it will take him to be unconscious or to cause him brain death, the decision establishes that "both methods would result in unconsciousness in approximately the same amount of time;"
- Mr. Bucklew's claim on experiencing choking sensations if lethal injection is used, rests on the proposition that he could not be seated, which would be possible with lethal gas, but this argument lacks factual support in the record and in particular, there was no assertion as to what changes this would require in applying Missouri's lethal injection protocol in his execution;

- The Director of Corrections has the authority to make changes in the execution protocol such as how the primary IV line will be inserted in the central femoral vein or how the gurney will be positioned, if the execution team advises that changes are needed during the preparation;
- While Mr. Bucklew sought and was denied discovery of the identities of the execution team's medical members, he never urged the district court to establish a suitable fact-finding procedure for discovery of facts needed for the Director of Corrections to define the as-applied challenge in using the current lethal injection protocol on him;
- While the Director of Corrections had proposed to reposition the gurney during the execution, the record does not disclose whether Mr. Bucklew will in fact be supine during the execution nor does it disclose that a "cut-down" procedure will not be used to place the primary IV line in his central femoral vein, a procedure that was considered unnecessary by the State's expert; and,
- Mr. Bucklew's allegations are based on speculation that the Missouri authorities will employ such risk-increasing procedures.

52. In conclusion and based on the foregoing, the court reaffirmed that there was no basis to conclude Mr. Bucklew's "risk of severe pain would be substantially reduced by use of nitrogen hypoxia instead of lethal injection as the method of execution" and that he therefore failed to establish that lethal injection as applied to him would constitute cruel and

unusual punishment under the Eighth and Fourteenth Amendments.

53. The ruling also dismissed Mr. Bucklew's claim for access to background information on the members of the execution team, in particular the technicians' qualifications, training and experience. The decision considered that these arguments proceeded from the premise that the State's personnel "may not be qualified for the positions for which they have been hired" or that they "are incompetent or unqualified to perform their assigned duties." Moreover the court recalled that "the potentiality that something may go wrong in an execution does not give rise to an Eighth Amendment violation" as "some risk of pain is inherent in any method of execution –no matter how humane- if only from the prospect of error in following the required procedure." It also evoked its previous decision stating that Mr. Bucklew "may not be permitted to supervise every step of the execution process" and that it must be assumed that "those responsible for carrying out the sentence are competent and qualified to do so, and that the procedure will go as intended."

54. As for the dissenting opinion of Judge Collon, the Commission notes that it was based on the consideration that the case involved "genuine disputes of material fact that require findings of fact by the district court before this dispute can be resolved." Therefore Judge Collon was of the opinion that the case should be remanded to the district court to promptly conduct further proceedings.

55. Mr. Bucklew's execution is scheduled for March 20, 2018.

IV. ANALYSIS OF LAW

56. Taking into account the arguments of the parties and the proven facts, the Commission will conduct its analysis of law in the following order: i) Preliminary considerations on the IACHR's standard of review in cases involving the death penalty; ii) Right to humane treatment, and not to undergo cruel, degrading, and unusual punishment, and right to a fair trial in relation to the method of execution and judicial remedies; iii) Right to humane treatment, and not to undergo cruel, degrading, and unusual punishment in relation to Mr. Bucklew's time on death row; and iv) The right to life and not to receive cruel, infamous, or unusual punishment with respect to an eventual execution.

A. Preliminary considerations on the IACHR's standard of review in cases involving the death penalty

57. Before embarking on its analysis of the merits in the instant case, the Inter-American Commission considers it relevant to reiterate its previous decisions regarding the heightened scrutiny to be applied in cases involving the death penalty. The right to life has received broad recognition as the supreme human right and as a *condition sine qua non* for the enjoyment of all other rights.

58. That gives rise to the particular importance of the IACHR's obligation to ensure that any deprivation of life that may arise from the enforcement of the death penalty strictly abides by the requirements set forth in the applicable instruments of the Inter-American human rights

system, including the American Declaration.[33] That heightened scrutiny is consistent with the restrictive approach adopted by other international human rights bodies when analyzing cases that involve the imposition of the death penalty,[34] and it has been set out and applied by the Inter-American Commission in previous capital cases brought before it.[35]

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[33] See, in this respect, IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011.

[34] See, for example: I/A Court H. R., Advisory Opinion OC-16/99 (October 1, 1999), *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 136 (finding that "because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life is not arbitrarily taken as a result"); United Nations Human Rights Committee, *Baboheram-Adhin et al. v. Suriname*, Communications Nos. 148-154/1983, adopted on April 4, 1985, para. 14.3 (observing that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State"); *Report of the United Nations Special Rapporteur on Extrajudicial Executions*, Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (December 14, 1994) ("the Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trial to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life).

[35] IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, para. 54; Report No. 44/14, Case 12.873, Merits (Publication),

59. As the Inter-American Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees, among others.[36] In the words of the Commission:

> due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.[37]

60. The Inter-American Commission will therefore review the petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the rights to life, due process and fair trial, among others set out in the American Declaration have been respected by the State. With regard to the legal status of the American Declaration, the IACHR reiterates that:

> [t]he American Declaration is, for the Member States not parties to the American Convention, the source of international obligations related

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Edgar Tamayo Arias, United States, July 17, 2014, para. 127; Report No. 57/96, Andrews, United States, IACHR Annual Report 1997, paras. 170-171.

[36] IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, para. 41.

[37] IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, para. 34.

> to the OAS Charter. The Charter of the Organization gave the IACHR the principal function of promoting the observance and protection of human rights in the Member States. Article 106 of the OAS Charter does not, however, list or define those rights. The General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979, agreed that those rights are those enunciated and defined in the American Declaration. Therefore, the American Declaration crystallizes the fundamental principles recognized by the American States. The OAS General Assembly has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS.[38]

61. Finally, and bearing in mind the State's position, the Commission recalls that its review does not consist of determining that the death penalty and of itself violates the American Declaration. What this section addresses is the standard of review of the alleged human rights violations in the context of a judicial process culminating in the death penalty.

B. Right to humane treatment, and not to undergo cruel, degrading, and unusual punishment and right to a fair trial in relation to the method of execution and judicial remedies

62. Article XVIII of the American Declaration establishes the right to judicial protection as follows:

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38 IACHR, Report No. 44/14, Case 12,873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 214.

> Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

63. Article XXVI of the American Declaration establishes the right to due process as follows:

> (...) Every person accused of an offense has the right (...) not to receive cruel, infamous or unusual punishment.

1. General considerations

64. The Commission notes that even though the American Declaration does not prohibit the death penalty, the State has a heightened obligation to ensure that the method of execution does not constitute cruel, infamous or unusual punishment. In this regard, the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment observed that "[t]he fact that a number of execution methods have been deemed to constitute torture or CIDT, together with a growing trend to review all methods of execution for their potential to cause severe pain and suffering, highlights the increasing difficulty with which a state may impose the death penalty without violating international law."[39]

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[39] The death penalty and the absolute prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment, Juan E. Mendez, Human Right Brief, Volume 20, Issue 1, Article 1, p. 3.

65. Along these same lines, various supervisory bodies have considered that an execution method is incompatible with the right to humane treatment and the prohibition of torture when it is not designed to inflict the least possible suffering,[40] and have raised questions on the compatibility of the method of lethal injection with the prohibition of torture.

66. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has indicated with respect to the methods for the execution of the death penalty that

> the extraordinary power conferred on the State to end a person's life through a firing squad, hanging, lethal injection or other means to kill, poses a dangerous risk of abuse. This power can be kept under control only through the public supervision of the punishment. It is a commonplace that due process serves to protect the accused. However, due process is also a mechanism through which society ensures that the punishments inflicted on their behalf are fair.[41]

67. The Human Rights Committee has considered that when the death penalty is applied by a State

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[40] In that respect, guideline xi) of the "UE Guidelines on Death Penalty" establishes that "Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. It may not be carried out in public or in any other degrading manner EU Guidelines on the Death Penalty: revised and updated version.

[41] A/HRC/30/18, Human Rights Council, Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, para. 50.

party for the most serious crimes, it must not only be strictly limited in accordance with Article 6 of the International Covenant on Civil and Political Rights (ICCPR) but must also be carried out in such a way as to cause the least possible physical and mental suffering.[42] The Committee has evaluated the methods of execution of the death penalty in light of the prohibition of torture and cruel, inhuman or degrading treatment provided for in the ICCPR and has concluded that the methods of stoning[43], injection of untested lethal drugs, gas chambers,[44] burning and burying alive,[45] and public executions[46] are contrary to Article 7.[47]

68. With regard to the injection of untested lethal drugs, in its concluding observations on the fourth periodic report of the United States, the Human Rights Committee noted with concern reports "about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs." The Committee recommended that the State "ensure that lethal

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42 Human Rights Committee, General Comment No: 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 6.

43 Human Rights Committee, Concluding Observations: Iran (2011), para. 12.

44 Human Rights Committee, Communication No. 469/1991, Ng v Canada, Views adopted on 5 Nov 1993, para. 16.4.

45 Human Rights Committee, Malawi Africa Association v Mauritania, Report of the ACHPR of 11 May 2000, para. 120.

46 Concluding Observations: Democratic Republic of Korea (2001), para. 13.

47 See Human Rights Committee, Draft General Comment No.36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, para 44.

drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration and that information on the origin and composition of such drugs is made available to individuals scheduled for execution."[48]

69. Similarly, the Committee Against Torture has expressed its concerned that death penalty executions in the United States can be accompanied by severe pain and suffering and has called on the State to "carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering."[49]

70. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has considered that the method of lethal injection "as currently administered, does not work as efficiently as intended. Some prisoners take minutes to die and others become very distressed. New studies conclude that even if lethal injection is administered without technical error, those executed may experience suffocation, and therefore the conventional view of lethal injection as peaceful and painless death is questionable."[50] The Special Rapporteur has underlined that States must ensure that the method of execution employed causes the least possible physical

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[48] Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, para. 8.

[49] Committee against Torture, Conclusions and recommendations of the Committee against Torture, United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 31.

[50] Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/229, 9 August 2012, para. 38.

and mental suffering and has the burden of proof of establishing that there are no more humane alternatives available. [51]

71. In capital cases the State has an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die. In particular, the convicted person must have access to information related to the precise procedures to be followed, the drugs and doses to be used in the case of execution by lethal injection, and the composition of the execution team as well as the training of its members.[52]

72. Any person subjected to the death penalty must have the opportunity to challenge every aspect of the execution procedure and such information is necessary to file a challenge. The IACHR notes in this regard that the obligation of the State to provide due process is not limited to the conviction and post-conviction proceedings.[53] Accordingly, the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering.

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51 Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/229, 9 August 2012, para. 80 (b).

52 IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 123.

53 IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Ivan Teleguz, United States, July 15, 2013, para. 123.

2. Analysis of the case

73. The Commission notes that it is undisputed that Mr. Bucklew, sentenced to the death penalty in 1997, suffers from "cavernous hemangioma," a rare and congenital medical condition that causes large tumors of malformed blood vessels to grow on his head, face and neck. These tumors cause difficulty breathing and rupture under stress. The petitioners have argued before the Commission and the domestic judicial authorities that, due to this condition, there is a high risk that the application of Missouri's protocol of execution for lethal injection will cause excruciating suffering and pain to Mr. Bucklew. Taking into account the standard of the U.S. Supreme Court for these cases, Mr. Bucklew proposed "nitrogen hypoxia" as the alternative that could cause him less pain. As established in the proven facts, domestic judicial proceedings regarding this claim ended on March 6, 2018, with a decision of the Eight Circuit Court of Appeals in favor of the Missouri Department of Corrections and dismissing Mr. Bucklew's allegations. As of the date of the present report, his execution is scheduled for March 20, 2018.

74. The IACHR must analyze whether the United States provided an effective judicial remedy to Mr. Bucklew, and whether its actions and omissions during the judicial proceedings were compatible with its international obligations under the American Declaration, including strict compliance with the right not to be subjected to torture and cruel, infamous or unusual punishment.

75. From the judgments of June 15, 2017 and March 6, 2018 described in the proven facts, the Commission finds that they were clearly decided on

the basis of the standards set out by the U.S. Supreme Court in *Glossip v. Gloss*. The Commission recalls that according to that judgment, the prisoner has the burden to demonstrate three concurring elements: (i) that the method to be applied "presents a risk that is sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers;" (ii) the identification of a "known and available alternative method" that entails a lesser risk of pain; and (iii) that this alternative is "feasible, readily implemented" and would "in fact significantly reduce" the risk of severe pain.

76. The Commission notes that the burden of argumentation and proof with respect of each of the three elements resides primarily with the prisoner, and that the standard to be met to establish the three concurring elements jointly considered is very high. The IACHR considers that the effectiveness of a remedy that imposes such burdens in order to succeed must be analyzed taking into account that, in the instant case, access to justice is directly linked to the prohibition of torture and cruel and inhumane punishments. Therefore, it must be analyzed under the undisputed premise that the prohibition of torture is a peremptory norm of international law. Also, that under the American Declaration and other principal human rights instruments the use of torture and cruel and inhumane punishment is strictly prohibited. The United States has an obligation to ensure that no such treatment is imposed on persons under its jurisdiction, and this has implications in the analysis of judicial proceedings related to methods of execution that could breach that obligation.

77. The fact that the United States international obligations do not prohibit the death penalty does not mean that in can be imposed in a manner that could entail torture or inhumane or cruel treatment. In death penalty cases, in the event that the State becomes aware that there is a significant risk that the specific method of execution could cause a breach of its international obligations, including peremptory norms of international law, it is required to abstain from proceeding with the execution under those circumstances, regardless of whether there is an alternative method.

78. In the instant case, the judicial proceedings described in the proven facts reflect that, since 2014, Mr. Bucklew's defense has been presenting information on the risk that he would suffer excruciating pain upon the application of Missouri's protocol of execution by lethal injection. These arguments were supported by an expert opinion that established that, if subjected to execution by the existing protocol for lethal injection, during the execution Mr. Bucklew "will be aware he is choking on his own blood and in pain before the pentobarbital renders him unconscious and unaware of pain." The expert indicated that the period of suffering in such circumstances could last up to four minutes. The Commission considers that this particular risk of choking on his own blood, being aware of it, and for a period of up to four minutes, taking in consideration the context of extreme stress and anxiety, would constitute cruel and inhuman punishment. The IACHR finds that the severity of the suffering that would be imposed under such circumstances could amount to torture.

79. The Commission notes that the Missouri Department of Corrections presented another expert

opinion challenging, among other issues, the length of the period of time during which Mr. Bucklew would suffer. Because the district court ruled in favor of the Department of Corrections at the stage of summary judgment, the factual determinations were not fully litigated. In light of the findings at the stage of summary judgment, both the district court and the Eighth Circuit Court of Appeals found that Mr. Bucklew's defense had not sufficiently established the risk of needless suffering under the first requirement of *Glossip v. Gloss*. The decisions of June 15, 2017 and March 6, 2018 indicate that the courts ruled in favor of summary dismissal of the claims without a full trial to explore and resolve these factual disputes, taking into account that, in any case, Mr. Bucklew failed to demonstrate the existence of an alternative that would significantly reduce the level of pain.

80. The Commission highlights that the relevant question under the American Declaration is not the relative merits of lethal injection versus "nitrogen hypoxia" but whether the method planned to execute Mr. Bucklew will cause cruel and inhuman punishment or torture. Consequently, the main issue for analysis in light of the prohibition of cruel and inhuman punishment and torture is precisely the "factual disputes" with regard to the level and likelihood of suffering that execution by means of lethal injection would cause to Mr. Bucklew. The IACHR reiterates that, under peremptory norms of international human rights law and as reflected in the American Declaration, the United States has the duty to abstain from carrying out an execution when there is significant risk that it would breach the prohibition of cruel and inhuman treatment or torture. Compliance with this duty cannot be conditioned on the existence of "alternatives."

81. In this case, a very concrete risk of extreme suffering was presented to the courts by means of allegations and an expert opinion on the particular situation of Mr. Bucklew. Under international law, judicial authorities had the obligation to respond with due diligence to fully consider that risk before authorizing that execution could proceed. The district court identified the existence of factual disputes regarding the extent to which and length of time during which Mr. Bucklew would be aware of choking and being unable to breathe and that those disputes could not be resolved on summary judgment but only through a trial. For purposes of analysis, the district court "presume[d] that there is a substantial risk that [Mr. Bucklew] will experience choking and an inability to breathe for up to four minutes." The domestic courts, while accepting the existence of a specific risk in the particular situation of Mr. Bucklew, and expressly recognizing that key factual questions could not be fully resolved by means of a summary judgment, decided to proceed with the execution because Mr. Bucklew's defense had failed to establish the existence of an alternative method that would reduce the suffering.

82. The Commission considers that the summary dismissal of such claims demonstrates a failure to act with due diligence to fully examine them in light of the prohibition of torture and cruel and inhuman punishment. The Commission also observes that the standards applied effectively condition the granting of relief from a situation of cruel and inhuman treatment on a showing by the person concerned of a feasible alternative that will cause less suffering. What is required is a process that fully explores the possibility of the risk of cruel and inhuman suffering. Both the conditionality and the placing of the burden

of proof on the affected person are inconsistent with the guarantees required from an OAS Member State.

83. Taking into account the considerations above, the Commission concludes that the United States did not provide Mr. Bucklew with effective access to judicial protection with regard to his right to be free from torture and cruel and inhuman punishment in the context of the application of lethal injection as the method of execution. Therefore, the Commission establishes that the State is responsible for the violation of Articles XVIII and XXVI of the American Declaration to the detriment of Mr. Bucklew.

C. Right of protection against arbitrary arrest, to humane treatment, and not to undergo cruel, infamous, or unusual punishment, with respect to the deprivation of liberty on death row

84. As indicated above, Article XXVI of the American Declaration establishes that "Every person accused of an offense has the right (...) not to receive cruel, infamous or unusual punishment."

85. In both international human rights law and comparative law, the issue of long term deprivation of liberty on death row, known as the *death row phenomenon*, has been developed for decades, in light of the prohibition of cruel, inhuman, or degrading punishment in constitutions and in multiple international treaties, including the American Declaration of the Rights and Duties of Man (Articles XXV and XXVI). Bearing in mind the equivalent nature of the protections envisaged in this regard in the American Declaration and other international instruments, the Commission considers it relevant to cite a number of developments that have taken place

in the inter-American and other protection systems, including the regional and United Nations systems.

86. To start with, the Commission takes note of the concept of the *death row phenomenon* that the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has taken into consideration:

> (...) it consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death. [54] Those circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held. Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities.[55]

87. In the case of *Soering vs. The United Kingdom*, the European Court of Human Rights, in its interpretation of the norm banning cruel, inhuman, and unusual punishment and in reference to the death penalty, pointed out that:

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[54] United Nations. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment. 9 August 2012. A/67/279, para 42. Citing: Patrick Hudson, "Does the death row phenomenon violate a prisoner's rights under international law?" *European Journal of International Law*, vol. 11, No. 4 (2000), pp. 834-837.

[55] United Nations. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment. 9 August 2012. A/67/279. para 42.

> The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. [56]

88. The European Court was referring to an average of six to eight years on death row from imposition of the penalty to execution and it noted that proceedings and appeals subsequent to the imposition of the death penalty themselves have a bearing on the time spent on death row. The European Court nonetheless stated that:

> (...) just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death. [57]

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[56] ECtHR. Case of Soering v. The United Kingdom. Report No. 14038/88. Judgment, July 7, 1989. para. 104.

[57] ECtHR. Case of Soering v. The United Kingdom. Report No. 14038/88. Judgment, July 7, 1989. para. 106.

> (...)
> For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable.
>
> (...)
> However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.[58]

89. Furthermore, in a comparative law context, the Commission notes that in 1993 the Privy Council of the British House of Lords ruled on the issue of the *death row phenomenon* in the *Pratt and Morgan v. Jamaica* case, that:

> In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate

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[58] ECtHR. Case of Soering v. The United Kingdom. Report No. 14038/88. Judgment, July 7, 1989. para. 111.

procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

(...)

The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of Article 3 of the European Convention and their Lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.

To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1).

(...)

These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment".[59]

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[59] Pratt and Morgan v. The Attorney General for Jamaica and another (Jamaica) [1993] UKPC 1 (2nd November, 1993), paragraphs 73, 74, 75, and 84.

90. In the same vein, the Supreme Court of Uganda considered in 2009 that "to execute a person after a delay of three years in conditions that were not acceptable by Ugandan standards would amount to cruel, inhuman punishment."[60] For its part, the Supreme Court of Zimbabwe has pointed out since 1993 that "having regard to judicial and academic consensus concerning the death row phenomenon, the prolonged delays and the harsh conditions of incarceration, a sufficient degree of seriousness had been attained to entitle the applicant to invoke the protection concerning the prohibition of torture and inhuman or degrading punishment." That Supreme Court maintained that "52 and 72 months, respectively, on death row constituted a violation of the prohibition of torture and would render an actual execution unconstitutional."[61]

91. As established under proven facts, Russell Bucklew has been deprived of his liberty on death row from 1997 to the date of the present report, i.e., for more than 20 years. The Commission notes that the time spent by Russell Bucklew on death row greatly exceeds the length of time that other international and domestic courts have characterized as cruel, inhuman, and degrading treatment. The very fact of spending 20 years on death row is, by any account, excessive and inhuman. Consequently, the United States is responsible for violating, to the detriment of Russell Bucklew, the right to humane

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60 Supreme Court of Uganda in *Attorney General v. Susan Kigula* and 417 others (Constitutional Appeal No. 3 of 2006), 2009.

61 Judgment of the Supreme Court of Zimbabwe of 24 June 1993 in *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General* (4) SA 239 (ZS).

treatment, and not to receive cruel, infamous, or unusual punishment established in Article XXVI of the American Declaration.

D. The right to life and not to receive cruel, infamous, or unusual punishment with respect to the eventual execution of Russell Bucklew

92. Article I of the American Declaration sets forth the right to life, liberty and personal security, as follows: "Every human being has the right to life, liberty and the security of his person." The Commission already cited the relevant part of Article XXVI which also applies to the analysis in this section.

93. The Commission reiterates that it is not competent to review judgments handed down by domestic courts acting within their spheres of competence and with due judicial guarantees. In principle that is because the IACHR does not have the authority to superimpose its own interpretations on the assessment of facts made by national courts. The fourth instance formula, however, does not preclude the Commission from considering a case in which the petitioner's allegations entail a possible violation of any of the rights set forth in the Declaration.[62] This authority is heightened in cases involving imposition of the death penalty, given its irreversibility.

94. As indicated above, the Inter-American Commission considers that it is incumbent upon the national courts, not the Commission, to interpret and

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62 See, *mutatis mutandis*, IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996.

apply national law. Nevertheless, the IACHR must ensure that any deprivation of life resulting from imposition of the death penalty complies with the requirements of the American Declaration.[63]

95. Throughout this report, the Commission established that Mr. Bucklew did not have access to an effective judicial remedy to challenge the method of execution and its specific consequences for his right to humane treatment and not to receive cruel, infamous or unusual punishment. The Commission also established that this violation was particularly serious, taking into account the actual risk of excruciating suffering in the event of the application of the lethal injection protocol. Moreover, the Commission already established that the more than 20 years that Mr. Bucklew has been in death row constitute cruel and inhuman treatment.

96. Under these circumstances, the IACHR has maintained that executing a person after proceedings that were conducted in violation of his rights would be extremely grave and constitute a deliberate violation of the right to life established in Article I of the American Declaration.[64] Also, taking into account the specific circumstances of this case, the Commission considers sufficiently established that the execution of Mr. Bucklew, taking into account his medical condition, presents a substantial risk of imposing cruel and inhuman suffering.

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63 IACHR, Report No. 53/13, Case 12.864, Merits (Publication), Iván Teleguz, United States, July 15, 2013, para. 129.

64 IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Félix Rocha Díaz, United States, March 23, 2015, para. 106.

97. In light of the foregoing and taking into account the determinations made throughout this report, the IACHR concludes that the execution of Russell Bucklew would constitute a serious violation of his rights to life and not to receive cruel, infamous, or unusual punishment established in Articles I and XXVI of the American Declaration.

V. CONCLUSIONS AND RECOMMENDATIONS

98. Based on the legal and factual considerations set forth in this report, the Inter-American Commission concludes that the United States is responsible for violating Articles I (right to life, liberty, personal security and integrity), XVIII (right to a fair trial) and XXVI (right to due process of law) of the American Declaration to the detriment of Russell Bucklew. If Russell Bucklew were to be executed, the State would also be responsible for a serious and irreparable violation of the fundamental rights to life and not to receive cruel, infamous, or unusual punishment protected by Articles I and XXVI of the American Declaration.

99. Russell Bucklew is the beneficiary of precautionary measures adopted by the Inter-American Commission under Article 25 of its Rules of Procedure. The Inter-American Commission reaffirms to the State that carrying out a death sentence in the circumstances of the present case would not only cause irreparable harm to the person but would also deny his right to petition the Inter-American human rights system and to obtain an effective result, and that such a measure would be contrary to the fundamental human rights obligations of the United States as a member of the OAS pursuant to the

Charter of the Organization and the instruments deriving from it.[65]

Accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE UNITED STATES:

1. Grant Russell Bucklew effective relief. Taking into account the conclusions of the IACHR on the lack of an effective remedy to challenge the method of execution, the time Russell Bucklew has already been held on death row, his rare medical condition and the significant risk, due to that condition, that his execution would cause excessive suffering incompatible with the American Declaration, the Commission recommends that his sentence be commuted, that he be transferred out of death row, and that the State ensure that his conditions of detention are compatible with his human dignity.

2. Review its laws, procedures, and practices to ensure that the persons sentenced to the death penalty have access to effective judicial remedies to

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[65] See: IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 66; Report No. 52/01, Case No. 12.243, Juan Raúl Garza, United States, Annual Report of the IACHR 2000, para. 117; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Doc.OEA/Ser.L/V/II.11doc.21rev. (April 6, 2001) paras. 71 and 72. See also: International Court of Justice, *Case re. the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of March 3, 1999, General List, No. 104, paras. 22-28; United Nations Human Rights Committee, *Dante Piandiong et al. v. Philippines*, Communication No. 869/1999, UN Doc. CCPR/C/70/D/869.

challenge the possible impact of the method of execution on their fundamental rights in accordance with the standards set forth in this merits report.

3. Given the violations of the American Declaration the IACHR has established in the present case and in others involving application of the death penalty, the Inter-American Commission also recommends to the United States that it adopt a moratorium on the execution of persons sentenced to death.[66]

Approved by the Inter-American Commission on Human Rights on the 18th day of the month of March, 2018. (Signed): Esmeralda Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren, Joel Hernández, Antonia Urrejola and Flávia Piovesan, Commissioners.

The undersigned, Paulo Abrão, Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 49 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.

Paulo Abrão
Executive Secretary

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[66] See in this regard, IACHR, The death penalty in the Inter-American Human Rights System: From restrictions to abolition, OEA/Ser.L/V/II.Doc 68, December 31, 2011.